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ALEXANDER L. STEVAS,
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No. 81-2173

In the Supreme Court of the United States

OCTOBER TERM, 1981

JOHN M. GRABINSKI, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

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QUESTIONS PRESENTED

1. Whether a pretrial ruling refusing to dismiss a superseding information on the ground of prosecutorial vindictiveness is subject to an interlocutory appeal.

2. Whether a pretrial ruling refusing to dismiss an information because of an alleged Speedy Trial Act violation is subject to an interlocutory appeal.

3. Whether a pretrial ruling refusing to hold a hearing on probable cause and denying a motion to dismiss an information for lack of probable cause is subject to an interlocutory appeal.

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OPINION BELOW

The opinion of the en banc court of appeals (Pet. App. 1-28) is reported at 674 F. 2d 677. The initial dismissal order of the court of appeals (Pet. App. 31-32) is unreported.

JURISDICTION

The judgment of the court of appeals was entered on February 26, 1982. On April 21, 1982 Justice Blackmun extended the time for filing a petition for a writ of certiorari to and including May 20, 1982 (Pet. App. 30), and the petition was filed on that date. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

Petitioner was indicted in the United States District Court for the Eastern District of Missouri in a one-count indictment alleging willful failure to file a personal income tax return for the year 1976 (Pet. App. 1-2). He moved to

dismiss the indictment for lack of jurisdiction and, alternatively, moved for a change of venue to the District of Minnesota (Pet. App. 1-2; H. Tr. 18-45).[1] The district court denied petitioner's motion to dismiss for lack of jurisdiction but granted his motion for a change of venue. Subsequently, however, the district court reconsidered its ruling and dismissed the indictment without prejudice (Tr. 1-7).

Following this dismissal, the government filed a two-count information in the United States District Court for the District of Minnesota alleging willful failure to file income tax returns for the years 1975 and 1976 (Pet. App. 2). Petitioner responded by filing numerous motions to dismiss, including a motion to dismiss because of alleged vindictive prosecution, a motion to dismiss because of an asserted violation of the Speedy Trial Act, and a motion to dismiss based on a claim that the charges in the information were not supported by probable cause (Pet. App. 2). Those motions all were denied and petitioner filed a notice of appeal to the United States Court of Appeals for the Eighth Circuit (Pet. App. 2-3).

A panel of the court of appeals dismissed the appeal on the ground that the pretrial orders appealed from were not final judgments as required by 28 U.S.C. 1291 and that the "collateral order doctrine" of *Cohen* v. *Beneficial Industrial Loan Corp.*, 337 U.S. 541 (1949), did not apply (Pet. App. 31-32). Subsequently, the court of appeals reconsidered the case en banc and again dismissed the appeal for lack of jurisdiction (Pet. App. 1-28).

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[1] "Tr." refers to the transcript of proceedings held on March 23, 1981. "H. Tr." refers to the transcript of proceedings held on January 19, 1981.

DISCUSSION

1. Petitioner argues (Pet. 10-15) that the court of appeals erred in concluding that his claim of "vindictive prosecution" cannot be raised on appeal before final judgment.[2] Petitioner's argument is without merit. For the reasons stated by the Court in *United States* v. *Hollywood Motor Car Co.*, No. 81-1144 (June 28, 1982), claims such as this are not appealable on an interlocutory basis.[3]

2. Petitioner also argues (Pet. 20-24) that interlocutory appeal should be available from the denial of his pretrial motion to dismiss on speedy trial grounds. In *United States* v. *MacDonald*, 435 U.S. 850 (1978), however, this Court held that an interlocutory appeal is not available to review a pretrial denial of such a motion. Petitioner argues that *MacDonald* does not apply here because that case involved a Sixth Amendment claim, while the claim here is based on the Speedy Trial Act, 18 U.S.C. 3161 *et seq.* As the court of appeals explained (Pet. App. 11-12), however, this is a distinction without a difference.

While the Speedy Trial Act "injected a new concept of immediacy into the fundamental right to a speedy trial guaranteed by the Sixth Amendment," the Act does not vest a defendant "with a right not to be tried." *United States* v. *Bilsky*, 664 F. 2d 613, 618 (6th Cir. 1981); accord, *United States* v. *Mehrmanesh*, 652 F. 2d 766, 768-770 (9th Cir. 1981); see also *United States* v. *Hollywood Motor Car Co.*, *supra*, slip op. 6. Thus, petitioner's right to be free of any conviction that violates the requirements of the Act will not

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[2]Petitioner also made a double jeopardy claim in the courts below (Pet. App. 2), which he does not renew here.

[3]Although the merits of petitioner's "vindictive prosecution" claim are not before the Court, we believe that the claim is clearly without merit in light of this Court's recent decision in *United States* v. *Goodwin*, No. 80-2195 (June 18, 1982).

be irreparably lost if he cannot appeal before trial. The "collateral order" doctrine set forth in *Cohen* v. *Beneficial Industrial Loan Corp.*, 337 U.S. 541, 546 (1949), therefore applies neither to speedy trial claims under the Sixth Amendment (*United States* v. *MacDonald, supra*) nor to similar claims under the Speedy Trial Act.

3. Finally, petitioner argues (Pet. 15-20) that interlocutory appeal should lie from the denial of his pretrial motions to dismiss the information for lack of probable cause. The court below correctly concluded that such claims may not be raised on appeal before entry of final judgment.

In *Abney* v. *United States*, 431 U.S. 651, 663 (1977), this Court held that a pretrial order denying a motion to dismiss an indictment for failure to state an offense is not completely "collateral" to the merits of the case. Likewise, petitioner's claims concerning probable cause are not "completely separate from the merits" (*United States* v. *Hollywood Motor Car Co., supra*, slip op. 2), but instead are related to "the issues to be resolved at the upcoming trial" (*ibid.*). Accordingly, they present no basis for interlocutory review.

Moreover, delay of petitioner's trial to entertain an interlocutory appeal would be particularly inappropriate in light of this Court's repeated holding that "a judicial hearing is not prerequisite to prosecution by information." *Gerstein* v. *Pugh*, 420 U.S. 103, 119 (1975); *Beck* v. *Washington*, 369 U.S. 541, 545 (1962); *Lem Woon* v. *Oregon*, 229 U.S. 586 (1913). See also *United States* v. *Funk*, 412 F. 2d 452, 454-455 (8th Cir. 1969). There is no ground upon which an undetained defendant may challenge an information for lack of probable cause.[4] Thus, this contention would not

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[4]We note that petitioner was neither arrested nor otherwise detained in connection with the filing of the information. Thus, concerns for liberty interests arising from arrest and detention are not present here. See *Gerstein* v. *Pugh, supra*, 420 U.S. at 116-119.

appear to be cognizable in district court, let alone to supply a basis for a pretrial appeal. Accordingly, petitioner's appeal does not even arguably present " 'a serious and unsettled question' " (*Nixon* v. *Fitzgerald*, No. 79-1738 (June 24, 1982), slip op. 10, quoting *Cohen* v. *Beneficial Industrial Loan Corp.*, *supra*, 337 U.S. at 547), which is required to predicate a "collateral order" appeal.[5]

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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JULY 1982

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[5]As this Court explained in *Fitzgerald* (slip op. 9, quoting *Coopers & Lybrand* v. *Livesay*, 437 U.S. 463, 468 (1978)), the collateral order doctrine applies only to a "small class of interlocutory orders" meeting several stringent standards. This class embraces orders that " 'conclusively determine the disputed question, resolve an important issue completely separate from the merits of the action, and [are] effectively unreviewable on appeal from a final judgment.' " The Court added (slip op. 9-10) that, "[a]s an additional requirement, * * * an interlocutory order must 'present a serious and unsettled question.' "